IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 122

MUSKEGON MOTOR SPECIALTIES COMPANY,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

A short reply to the brief for the respondent in opposition to the petition for writ of certiorari in the above entitled matter may be proper.

The Government makes no answer to our contention that the Circuit Court of Appeals has decided an important question of federal law which has not been but which should be decided by this court. It states only that it is rightly decided.

The statement on page 11 of the brief for the respondent in respect to the taxpayer's contentions as to the

issues involved in the case is not precise. The first contention as stated is correct. The taxpayer, however, also contends that the transaction involved was not an intercorporate transaction and so not a reorganization (Specification of errors 2, 4 and 5, page 18, of petitioner's brief). The reorganization provisions of the statute are restricted to intercorporate transactions. *Helvering v. Cement Investors*, 316 U. S. 527.

In this connection it is contended that the real transferors of the property were the Gordon and Muskegon-Michigan stockholders and not the Gordon and Muskegon-Michigan companies. Respondent's brief makes no answer to this.

It is also contended that the transaction was not a tax-free transaction. No reply is made to this except to claim that petitioner has not repeated in its brief the contention made below that an adjustment for the gain realized by the individual stockholders. Obviously, if the real transferors are the stockholders and they paid a tax on a profit of upwards of $1,222,000.00, the bases should be increased.

The second statement as to petitioner's contention is correct. The petitioner does contend that, assuming that the transaction was intercorporate, 50% control did not remain in the same persons or any of them, and also 50% interest did not remain in the same persons or any of them.

On page 7 of respondent's brief appears the following:

> "The taxpayer agreed to issue 110,000 shares of its common stock and to pay $1,445,004.17 to the

> holders of all the capital stock of Muskegon-Michigan and the Gordon Company."

It might be inferred from this that all of the stockholders of both companies not only received some cash, but also that all of them received some of the 110,000 shares of common stock. This is not the fact. Fourteen hundred forty shares of Gordon Company, or 72% of that company's total shares received no stock whatever and received nothing but cash. This error is emphasized again on page 12 of the brief by the following statement:

> "Stockholders of the old companies received all except 12% of the outstanding common stock of the new company."

While this does not say that all the stockholders of the old companies received common stock, it nevertheless may imply that they so did.

The statement by counsel in the note on page 11 of his brief that the requirement of 50% interest or control "is no longer present in the statutes," etc., is correct if it means no more than that this clause has been stricken from Section 113 (a) (7), insofar as being applicable to property acquired in a reorganization after December 31, 1935. But the inference which may be sought to be drawn from this note is that, since the later statutes eliminate the 50% clause, its proper construction is not of any importance. This is not true. The clause is still applicable in respect to all reorganizations in which property was acquired after December 31, 1917, and before January 1, 1936. It will operate in the determination of depreciation and of gain or loss in case of the sale of any such property at any time in the future. Its meaning and construction are therefore still of major importance.

CONCLUSION

We, submit therefore, that the brief of respondent makes no answer or reply to the following contentions made by us:

1. That this was not a reorganization because it was not an intercorporate transaction, but was a transaction between the stockholders of Gordon and Muskegon-Michigan individually and Petitioner and that neither Gordon nor Muskegon-Michigan were a party to any reorganization.

2. That the real transferors of the property were the stockholders of Gordon and Muskegon-Michigan and that, therefore, the basis should be increased in the amount of gain recognized to these transferors.

3. That Petitioner did not acquire the property in a tax-free exchange or non-taxable transaction and hence the transferor basis is not applicable but must be increased by the amount of gain recognized to the transferor.

4. That before the transfer Mr. and Mrs. Gordon had only a 28% interest in the Gordon assets and none in the Muskegon-Michigan assets. They had a smaller percentage after the transfer, and hence neither before nor after the transfer did 50% interest or control remain in them or any of them. The other Gordon stockholders received cash only and no stock.

5. That before the transfer the Muskegon-Michigan stockholders had no stock in the Gordon Company or other

interest in the Gordon assets and after the transfer they did not have a 50% interest or control in either the Gordon assets or the Muskegon-Michigan assets and that, therefore, an interest or control in the property of 50% or more did not remain in them or any of them.

6. That the foregoing and other questions raised by petitioner are important questions of federal law which have not been but should be decided by this Court.

Respectfully submitted,

HAL H. SMITH,
Counsel for Petitioner.

ARCHIBALD BROOMFIELD,
MELVILLE C. MASON,
BEAUMONT, SMITH & HARRIS,
Of Counsel for Petitioner.

Address: 11th Floor Ford Building,
Detroit, Michigan